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Financial Services Authority
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By post and e-mail

Dear Tracey, David and Sean

Re: Cleansing Announcements

The City of London Law Society ("**CLLS**") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

This letter has been prepared by The City of London Law Society Regulatory Law Committee. Members of the Committee advise a wide range of firms across Europe who operate in or use the services provided by the financial markets. European clients include banks, brokers, investment advisers, investment managers, custodians, private equity and other specialist fund managers as well as market infrastructure providers such as the operators of trading, clearing and settlement systems.

We write in respect of a particular statement made in the decision notice in respect of David Einhorn and other related publications. We do not express any views on the decisions reached by FSA in that case but would like to comment on one particular issue arising from the decision notice. Richard Ufland who chairs the Company Law Committee of the Law Society has seen this letter and has confirmed that that Committee agrees with the views expressed in this letter.

Paragraph 3.11 of the notice contains the following statement:

> *"3.11. Once a third party agrees to be wall crossed, it can be provided with inside information and it is then restricted from trading. The party is only able to trade in the company's shares again once the information it has been given is made public. In the context of a transaction, the information will be made public either when the transaction is announced to the market, or in cases where a transaction does not proceed, when an announcement is made to the market stating that a transaction was contemplated, but did not proceed. This announcement may be referred to as a cleansing statement."*

The comments in this part of the notice are not directly relevant to the case at hand, since there appears to have been no agreement to a wall crossing and neither was information given in respect of a transaction which did not proceed, hence the question of a cleansing statement did not arise.

However, we note, with concern, the proposition that there should in all cases be a cleansing statement when information is provided about a possible transaction. While we agree that a party who receives inside information will remain unable to trade for so long as it remains inside information, we do not believe that it will always necessarily be the case that the fact that a capital raising is not going ahead remains inside information.

Information imparted may cease to be inside information for a number of reasons, such as because it has become stale due to the lapse of time as well as change of circumstances.

For example, a company may ask an investment bank to approach a small number of investors about a possible small opportunistic placing, and having received feedback determine that the market is not as favourable as was thought. Should that company determine not to proceed having received that market feedback, it is unlikely that an announcement would be required that these discussions took place. Further, it is not inevitable that the prior existence of a contemplated transaction always remains "specific" under the definition or would be likely to have a significant effect on the price of the relevant securities, and the fact that it was previously contemplated need not necessarily be inside information in its own right.

This is a matter of some practical significance because it has become an integral part of most capital raisings that pre-marketing or soft soundings should take place on a wall-crossed basis and without this ability it would be much more difficult for companies to raise finance in the capital markets. There are also many other situations where an issuer might explore a possible transaction but then decides not to proceed – often, once it has taken the decision not to proceed, there is no inside information remaining as regards the fact that it may have previously contemplated the transaction and it would be impractical for issuers to be required to make cleansing statements in these circumstances.

FSA does not appear to have any objection in principle to such discussions taking place, as is clear from paragraph 3.8 of the decision notice, among others. However, in light of the statement quoted above, there is a risk that investors will refuse to take part in any such discussion unless they receive an assurance from the issuer or its adviser that they will issue a cleansing announcement if the deal does not proceed. Issuers will naturally

be very wary of giving any such guarantee, and may well be advised that it is not a requirement on the basis that if no deal transpires there will be no requirement to make any such announcement in circumstances where no inside information continues to exist. Where a cleansing announcement is made, it will not always expressly state all the information that has been provided and it has always been a question of judgement what amounts to inside information and therefore needs to be included.

We appreciate that these statements do not amount to regulatory guidance nor to a binding precedent (and that final notices do sometimes contain broad general statements which are not a precise description of the law but which serve as a context for the particular case), and so we would not normally seek to comment on them. However on this occasion we consider that in light of the issues raised in this letter it would be of considerable assistance to issuers and investors if the FSA were to clarify that a cleansing statement will be required only where information about the cancelled transaction remains inside information. This clarification might be achieved, for example, through comment in a Market Watch publication.

If FSA would find it helpful to discuss the implications of this further then we would be happy to do so.

Yours sincerely

P.P.

Margaret Chamberlain
Chair, Regulatory Law Committee
CLLS

THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

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